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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION and
JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

On Appeal From
The United States District Court
For The Southern District Of Mississippi

AMICUS CURIAE BRIEF OF POTOMAC ELECTRIC POWER COMPANY IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED FOR REVIEW

This case concerns the constitutionality of Titles I and III and Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). The appellant federal agencies have failed to address the one question, and the one central precedent respecting it, which is dispositive of the issue of the unconstitutionality of PURPA Section 210. This question is whether the grant of authority to the States by PURPA Section 210 over sales by certain producers of electricity in interstate commerce to an electric utility for resale is void because it violates the plenary and exclusive authority of Congress over such sales pursuant to the Commerce Clause, first confirmed by the Supreme Court in *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927).

The questions therefore are:

PURPA Section 210 of Title II –

Can Congress constitutionally delegate to the States its plenary and exclusive power to regulate interstate commerce under the Commerce Clause of the United States Constitution?

PURPA Titles I and III –

Under the Commerce Clause of the United States Constitution, can Congress regulate the States' exercise of their sovereign legislative powers over the governance of intrastate commerce, which powers are reserved to the States by the Tenth Amendment to the United States Constitution, in order to foster a federal regulatory program?

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AMICUS CURIAE BRIEF OF POTOMAC ELECTRIC POWER COMPANY IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is filed on behalf of Potomac Electric Power Company (Pepco; Company) in support of the Appellees — the State of Mississippi, the Mississippi Public Service Commission, and Mississippi Power and Light Company. Written consent from each party to the filing of this brief has been obtained by Pepco and has been filed with the Clerk of the Court.

Pepco is a District of Columbia and Virginia corporation and is also licensed to do business in the State of Maryland and the Commonwealth of Pennsylvania. Pepco sells electric energy at retail in intrastate commerce within the District of Columbia, Maryland and Virginia and at wholesale for resale in interstate commerce in Maryland. Pepco's retail sales are regulated by the Public

Service Commissions of the District of Columbia and Maryland and the State Corporation Commission of Virginia. Pepco is a Public Utility whose sales for resale and transmission of electricity in interstate commerce are regulated by the Federal Energy Regulatory Commission (FERC) pursuant to Parts II and III of the Federal Power Act, 16 U.S.C. §§ 824-825 (1976 & 1980 Supp.).

Pepco notes as a preliminary matter that for many years it has been in substantial compliance in each of its retail jurisidictions with the ratemaking standards now specified in the Public Utility Regulatory Policies Act of 1978 (PURPA). Pepco's opposition to PURPA Section 210 of Title II and to Titles I and III of PURPA stems from the unconstitutionality of these provisions.

Certain provisions of PURPA — specifically Section 210 of Title II and Titles I and III[1] — order the States to undertake significant and detailed regulatory actions with respect to wholesale utility transactions in interstate commerce and retail utility transactions in intrastate commerce. These provisions were declared unconstitutional by the district court below. If the district court's decision is affirmed with respect to PURPA Section 210, the unconstitutional and factually unwarranted direct intrusion of State control over wholesale prices in interstate commerce will be nullified and the Federal Energy Regulatory Commission will be returned the ability to regulate all interstate transactions under the Federal Power Act, 16 U.S.C. §§ 824, *et seq.* (1976 & 1980 Supp.). If the district court's decision is affirmed with respect to Titles I and III of PURPA, the unconstitutional and factually unwarranted direct intrusion of federal control over State

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[1] 16 U.S.C. §§ 824a-3, 2601 *et seq.* (1980 Supp.); 15 U.S.C. §§ 3201 *et seq.* (1980 Supp.).

actions respecting retail price regulation in intrastate commerce will be nullified and the States, including the three which regulate Pepco's retail sales of electric energy, will regain the ability to structure and effect their regulatory ratemaking functions in the manner they deem best suited to serve the public interest.

Therefore, Pepco has a substantial interest in the subject matter of this proceeding.

SUMMARY OF ARGUMENT

The appellant federal agencies and the *amici curiae* in support do not address the central issue respecting the constitutionality of PURPA Section 210:

> Can Congress delegate to the States its plenary and exlusive power to regulate interstate commerce under the Commerce Clause of the United States Constitution?

The answer is no. PURPA Section 210 is unconstitutional in its attempt to delegate to the States regulatory authority over sales of electricity in interstate commerce to utilities from certain other producers of electricity for resale by the utilities. *Public Utilities Commission* v. *Attleboro Steam & Electric Company,* 273 U.S. 83 (1927).

Under the Commerce Clause of the Constitution, art. I, § 8, cl. 3, Congress is granted plenary and exclusive authority over activities which are in interstate commerce. Because of this constitutional grant of plenary and exclusive authority, the States are powerless to regulate activities in interstate commerce, even when Congress itself has declined to undertake such regulation and even when Congress has attempted to delegate such regulation to the States. *Public Utilities Commission* v. *Attleboro Steam & Electric Company, supra,* 273 U.S. at 89-90; *Churchill* v. *City of Utica,* 70 U.S. (3 Wall.) 573, 585 (1866).

A sale of electricity to any utility by any other producer of electricity (for further resale or for resale of the electricity in intrastate commerce to its retail customers) is a sale of electricity in interstate commerce which no State can regulate. *Public Utilities Commission* v. *Attleboro Steam & Electric Company, supra,* 273 U.S. at 89-90. Pursuant to PURPA Section 210, 16 U.S.C. § 824a-3 (1980 Supp.), regulatory authority over such sales is not only granted to the States by Congress, but also is mandated of the States by Congress. This grant and requirement of authority is void, for it violates the plenary and exclusive authority over interstate commerce granted to Congress by the Commerce Clause of the Constitution. *Id.*

Also under the Commerce Clause, Congress is granted limited authority over activities which are in intrastate commerce. *See The Minnesota Rate Cases (Simpson* v. *Shepard),* 230 U.S. 352, 399-400 (1913). This authority may be exercised by Congress only to the extent that the intrastate activities have a substantial effect upon interstate commerce. *See Fry* v. *United States,* 421 U.S. 542, 547 (1975). In addition, this authority may be exercised by Congress only to the extent that the powers reserved to the States by the Tenth Amendment are not usurped. *National League of Cities* v. *Usery,* 426 U.S. 833, 851-52 (1976).

PURPA Titles I and III and Section 210 of Title II exceed the limitations placed by the Tenth Amendment upon the authority of Congress under the Commerce Clause. These provisions require the States to hold hearings, to adopt specified procedures, to permit interventions, to make specified findings of facts on the basis of specified evidence, to comply with reporting requirements, and to implement federally promulgated regulations. Thus, PURPA Titles I and III and Section 210 of

Title II do not regulate commerce but State governance of intrastate commerce. *See, e.g., Brown* v. *EPA*, 521 F.2d 827, 838-39 (9th Cir. 1975). They regulate the States as States. *Id.* They do so in an area which is the essence of State sovereignty — the States' legislative authority in the exercise of their police powers respecting intrastate commerce. *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891); *Munn* v. *Illinois*, 94 U.S. 113, 125 (1877). PURPA Titles I and III and Section 210 of Title II regulate the States as States in the legislative area of public utility retail ratemaking — an area which is a subject of traditional State regulation and legislative authority. *See Munn* v. *Illinois, supra*, 94 U.S. at 125; H. Rep. No. 95-1750, 95th Cong., 2d Sess. 67 (1978). Thus, under the Court's decisions in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 101 S. Ct. 2352 (1981), PURPA Titles I and III and Section 210 of Title II impair the rights reserved to the States by the Tenth Amendment and accordingly transgress the limits of authority held by Congress under the Commerce Clause.

In the presence or in the absence of Tenth Amendment limitations on Congressional authority under the Commerce Clause, PURPA Titles I and III and Section 210 of Title II exceed the limits of Congressional commerce power. Public utility retail services are matters internal to the States which under no circumstances could be regulated by Congress unless such regulation could rationally be related to necessary exercise of control over interstate commerce. *See Fry* v. *United States, supra*, 421 U.S. at 547. There is no rational basis for federal regulation over retail utility ratemaking.

ARGUMENT

A.

Purpa Section 210 Of Title II Violates The Plenary And Exclusive Federal Authority Respecting Interstate Commerce By Purporting To Grant The States Direct Regulatory Control Over Sales Of Electricity In Interstate Commerce To Utilities By Certain Other Producers Of Electricity

Pursuant to PURPA § 210, Congress has attempted to delegate to the States its exclusive authority over interstate commerce. Congress is powerless to delegate an exclusive federal function to the States and the States cannot impose a direct burden on interstate commerce.

The Commerce Clause of the Constitution, art. I, § 8, cl. 3, grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." The power given Congress pursuant to the Commerce Clause is plenary and exclusive. Only the federal government can regulate interstate commerce. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 196-97 (1824). "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than those prescribed in the constitution." *Id.* at 196.

The States are not competent to impose a *direct* burden on interstate commerce through their regulation of internal activities. This fact is true even when Congress has not seen fit to regulate. In *The Minnesota Rate Cases (Simpson v., Shepard),* 230 U.S. 352, 396-97 (1913), the Court stated as follows:

> If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly re-

> strained that which, in the absence of Federal regulation, should be free.

(Emphasis original.) Those things which "in the absence of Federal regulation, should be free," are activities essentially national in character and requiring uniform regulation. *Id.* at 399. With respect to these activities, the power of Congress to regulate under the Commerce Clause is exclusive.

> The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. *It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive.*

The Minnesota Rate Cases, 230 U.S. at 399 (emphasis supplied).

Certain aspects of the electric and natural gas industries have been declared by the Court to be in interstate commerce and thus subject to the exclusive authority of Congress under the Commerce Clause, *i.e.*, the transmission of natural gas or electricity by a utility whose transmission system crosses state boundaries, the sale of natural gas or electricity by such utility for resale, and the sale to such utility by any other producer of natural gas or electricity.

In *Missouri ex rel. Barrett* v. *Kansas Natural Gas Company*, 265 U.S. 298 (1924), the Court determined that the business of the Kansas Natural Gas Company was in interstate commerce and was therefore free from state interference, even in the absence of federal regulation. The

Kansas Natural Gas Company was engaged in the business of producing and purchasing natural gas from other producers for transmission and resale to distributing companies in various states. The distributing companies then resold the gas to local consumers. 265 U.S. at 305. The Court stated that the "[t]ransportation of gas from one state to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce." *Id.* at 307. Therefore, the Court found that, if the transportation and sale for resale of natural gas was to be regulated, such regulation must come exclusively from Congress. The States were denied all authority to act. *Id.*

The same result was reached by the Court three years later with respect to the electric utility industry in *Public Utilities Commission* v. *Attleboro Steam & Electric Company,* 273 U.S. 83 (1927). In *Attleboro,* the Court determined whether the state regulatory commission of Rhode Island could establish a rate for the wholesale sale of electricity, which electricity was resold by the purchaser in another state. Again, the Court found that the state commission could not act, notwithstanding the absence of federal regulation, creating what was then known as the *Attleboro* gap in utility regulation. The Court stated in *Attleboro* as follows:

> It is clear that the present case is controlled by the Kansas Natural Gas Co. Case. The order of the Rhode Island Commission is not . . . a regulation of the rates charged to local consumers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the

> Commerce Clause, it must necessarily fall, regardless of its purpose . . . . [T]he paramount interest in the interstate business carried on between the two companies is not local to either [affected] State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress.

Id. at 89-90. The Court further stated that the transmission of electricity, like the transportation of natural gas, is an activity in interstate commerce. *Id.* at 86.

Based upon the decisions of the Court in *Kansas Natural Gas Company* and *Attleboro*, it is clear that the transportation and sale for resale of natural gas and the transmission and sale for resale of electricity in interstate commerce are subject to the exclusive regulatory authority of Congress under the Commerce Clause. Indeed, the Natural Gas Act, 15 U.S.C. §§717 *et seq.* (1976), and Parts II and III of the Federal Power Act, 16 U.S.C. §§ 824-825 (1976), were enacted in order to fill the gap in regulation over the natural gas and electric utility industries which followed the Court's decisions in *Kansas Natural Gas Company* and *Attleboro*. *See, e.g., Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 609-10 (1944); *United States* v. *Public Utilities Commission*, 345 U.S. 295, 311 (1953).

The exclusive authority of Congress over sales of electricity for resale by a producer or a transmitter of natural gas or electricity is not altered by the fact that the sale seemingly takes place entirely within one state. The sale is nevertheless in interstate commerce if the transmission system of the utility purchaser crosses state boundaries, because any purchase of electricity or natural

gas by a utility is automatically commingled with the electricity or natural gas being transmitted on the utility's system at the time. *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366, 369-70 (1965). The purchased electricity or natural gas cannot be isolated or traced through the system so as to locate the point of resale. *Id.* at 369-70. If it could be traced, it would be found to be resold throughout the entire interstate system.[2] As a result, all sales of electric energy for resale, at least in the forty-eight continental states, are activities in interstate commerce subject under the *Attleboro* doctrine to the exclusive authority of Congress pursuant to the Commerce Clause.[3]

Under PURPA Section 210, Congress attempts to do what the Supreme Court in *Attleboro* stated could not constitutionally be done. It attempts to give to the States authority to regulate sales of electricity by certain other producers of electricity to a utility in interstate commerce for resale to the utility's customers, including that

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[2] The interstate nature of the electric utility industry is generally recognized. Forty-seven of the forty-eight continental states were electrically interconnected as of 1972. *Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453, 471 (1972) (Douglas, J., dissenting). Since then, the utilities in Texas have been added to the electric interconnection for some purposes.

[3] The possibility that there might be a situation wherein a given producer will not generate amounts of electricity greater than his own energy needs is irrelevant to the exclusive authority of Congress over that producer's sale of its generation to the utility, for that sale is in interstate commerce. The fact that the cogenerator or small power producer is on the utility's interstate system, thus contributing to or affecting the electricity flow on the interstate grid, is sufficient to bring the activity within the exclusive jurisdiction of Congress under the *Attleboro* doctrine. *See Federal Power Commission* v. *Florida Power & Light Co., supra*, 404 U.S. at 460-61.

utility's wholesale customers in other states.[4] PURPA Section 210 provides for the promulgation by the Federal Energy Regulatory Commission of certain regulations to govern purchases and sales of electric energy by utilities to and from certain other producers of electricity. *See* 18 C.F.R. §§292.401 *et seq.* PURPA Section 210(f) requires, however, that the States implement the regulations and that the States establish the rates for purchases and sales between utilities and certain other electricity producers. Under the *Attleboro* doctrine, *supra,* the States may not constitutionally carry out this regulation over rates for the sale of electricity in interstate commerce by any producer of electricity to a utility for resale. That regulation is within the plenary and exclusive authority of Congress.

The exclusive authority of Congress under the Commerce Clause to regulate the sale of electricity by a producer of electricity to a utility for resale is not changed by the fact that Congress itself under PURPA has directed the States to exercise regulatory authority over such sales for resale. Congress may not grant to the States "a power not possessed by the States." *Wilkerson* v. *Rahrer,* 140 U.S. 545, 561 (1891). In *Churchill* v. *City of Utica,* 70 U.S. (3 Wall.) 573, 585 (1866), the Court stated the following:

> It is said that Congress possesses no power to confer upon a state authority to be exercised which has been exclusively delegated to that body by the Constitution . . . nor is a state competent to receive a grant of any such power from Congress. We agree to this.

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[4] PURPA Section 210 also addresses rates for retail sales by a utility to cogenerators and small power producers for their own consumption. While this aspect of Section 210 does not in itself offend the exclusive authority of Congress over wholesale rates, it does offend the Tenth Amendment. *See* pages 12-22, *infra.*

In summary, Section 210 of Title II of PURPA unconstitutionally grants to the States regulatory authority over sales of electricity by certain other producers of electricity to utilities in interstate commerce for resale. Such sales are subject to the plenary and exclusive jurisdiction of Congress under the Commerce Clause. Congress has no power to grant to the States its exclusive authority over such sales of electricity and the States are not competent to receive such authority from Congress. Therefore, Section 210 of Title II of PURPA is an unconstitutional violation of the exclusive authority held by Congress under the Commerce Clause and is void.

B.

PURPA Titles I And III And Section 210 Of Title II Violate The Tenth Amendment To The Constitution

As noted previously, *see* page 6, *supra*, the power given to Congress pursuant to the Commerce Clause of the Constitution is plenary. It includes exclusive authority to govern commerce which is directly in interstate commerce and authority to govern intrastate commerce internal to the States — as opposed to governance of intrastate commerce internal to the States — if that commerce substantially affects interstate commerce. *Fry* v. *United States, supra,* 421 U.S. at 547; *Brown* v. *EPA,* 521 F.2d 827, 838-39 (9th Cir. 1975).

The plenary authority granted Congress by the Commerce Clause, however, is limited by other provisions of the Constitution. *See Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1, 196 (1824); *National League of Cities* v. *Usery,* 426 U.S. 833, 841 (1976). Thus, Congress may not enact legislation under the Commerce Clause which impairs the rights reserved to the States by the Tenth Amendment to the Constitution. *Id.*

Under the Tenth Amendment, "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U.S. at 547 n. 7. In order to determine whether or not Congress has impermissibly intruded upon the rights reserved to the States by the Tenth Amendment, the Court has established a three-part test. If the Congressional enactment regulates the States as States with respect to a matter which is indisputably an attribute of state sovereignty and does so in such a manner as to impair the ability of the States to structure integral operations in areas of traditional functions, then a violation of the Tenth Amendment may be found. *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, 101 S. Ct. 2352, 2366 (1981); *National League of Cities* v. *Usery, supra*, 426 U.S. at 845-52. When judged by the test set forth in *National League of Cities* and reaffirmed in greater detail in *Virginia Surface Mining*, PURPA violates the Tenth Amendment to the Constitution.

1. PURPA "regulates the States as States"

PURPA Titles I and III and Section 210 of Title II require the States, through State agencies, to undertake significant regulatory activities to carry out a federal program. PURPA mandates, *inter alia*, that State regulatory authorities shall consider specific ratemaking standards, and requires that designated factual determinations shall be made respecting the federal standards if prescribed evidence is shown in utility regulatory proceedings.[5] These

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[5] *See, e.g.*, the PURPA requirement that State regulatory authorities shall consider a federally-defined time of day rate standard for electric utilities, PURPA §§111(d)(3) and 112, 16 U.S.C. §§ 2621(d)(3), 2622 (1980 Supp.), and that specific factual determinations that time of day rates are cost effective shall be made if

federally-mandated requirements unconstitutionally dictate the nature and specific course of conduct of proceedings conducted by State authorities respecting utility regulatory matters and also constitute an unwarranted attempt by the federal government to shape the outcome of State proceedings by prescribing the nature and extent of the inquiry undertaken by State regulatory bodies in detail. The activities mandated by PURPA require substantial reallocation of the time, personnel, and other resources of the States, and revision in the substantive and procedural operations of the States' regulatory agencies. Failure by the States to carry out the requirements imposed by PURPA subjects the States and their regulatory agencies to suit in state and federal court.

Pursuant to PURPA §111(a) of Title I, 16 U.S.C. §2621(a) (1980 Supp.), each State regulatory agency which has ratemaking authority over an electric utility must hold hearings within prescribed time limitations to consider each of the rate design standards established by the Act. The hearings mandated by PURPA must be held in accordance with the procedural requirements set forth in PURPA §111(b), 16 U.S.C. §2621(b) (1980 Supp.). Pursuant to PURPA §113(a), 16 U.S.C. § 2623(a) (1980 Supp.), each State regulatory authority must also hold hearings within prescribed time limitations to consider each of the regulatory standards established by the Act. Those hearings must also be held in accordance with the detailed procedural mandates set forth in §113(c). Pursuant to PURPA §114, 16 U.S.C. § 2624 (1980 Supp.), each State regulatory authority must hold an evidentiary hearing to consider the adoption of lifeline rates whether

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certain federally-prescribed factual showings are made in proceedings before the State regulatory authority. PURPA §115(b), 16 U.S.C. §2625(b) (1980 Supp.).

or not the agency has already repeatedly rejected this concept. Pursuant to PURPA § 115, 16 U.S.C. § 2625 (1980) Supp.), each State regulatory agency must make certain detailed factual findings in the context of extremely complex matters of evidence, structuring those findings in certain specific ways. Pursuant to PURPA §116, 16 U.S.C. § 2626 (1980 Supp.), each State regulatory authority must report to the Secretary of Energy annually, for ten years, the determinations which the authority has made with respect to each of the rate design and regulatory standards. Pursuant to PURPA §121, 16 U.S.C. § 2631 (1980 Supp.), each State regulatory authority must permit intervention of the Secretary of Energy and of any electric consumer in the proceedings. Also pursuant to §121, the State regulatory authority must permit any intervenor to have access to certain information. Failure to comply with any of the foregoing requirements subjects the State regulatory authority to suit in the appropriate court. 16 U.S.C. § 2633 (1980 Supp.).

PURPA Section 210, 16 U.S.C. § 824a-3 (1980 Supp.), of Title II requires each State regulatory authority, within prescribed time limitations, to implement regulations promulgated by the Federal Energy Regulatory Commission with respect to certain producers of electricity and to set rates and terms of service for certain wholesale for resale transactions in interstate commerce. Failure to comply with the implementation requirements of Section 210 subjects the State regulatory authority to suit in federal court. 16 U.S.C. § 824a-3(h) (1980 Supp.).

PURPA Title III, 15 U.S.C. §§ 3201 *et seq.* (1980 Supp.), imposes requirements on State regulatory authorities in connection with natural gas companies analogous to the requirements imposed on State regulatory authorities by Title I in connection with electric utilities.

All of the foregoing requirements, which constitute the principle regulatory framework of PURPA Titles I and III and Section 210 of Title II, clearly address the States as States. The control of the States is direct and there is no means by which a State may opt out of the federal scheme whether a State wishes to adopt a federal standard or whether it does not.

Thus, PURPA is clearly and significantly distinguishable from the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§1201 *et seq.* (1980 Supp.), the constitutionality of which was before the Court for consideration in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc., supra,* 101 S. Ct. 2352. In *Virginia Surface Mining,* implementation by the States of the federal program imposed under that act was voluntary. The Secretary of the Interior was responsible for enforcement of the federal program if a State declined to undertake implementation of the federal program. The Court therefore concluded that "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 2366.

By contrast, PURPA is not significantly distinguishable from the federal program promulgated by the Administrator of the Environmental Protection Agency pursuant to the 1970 Amendments to the Clean Air Act, 42 U.S.C. §1857, certain aspects of which were the subject of substantial constitutional concern in cases before the United States Courts of Appeal for the District of Columbia, Fourth, Fifth and Ninth Circuits.[6] The program pro-

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[6] *See District of Columbia* v. *Train,* 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded sub nom. EPA* v. *Brown,* 431 U.S. 99 (1977); *Maryland* v. *EPA,* 530 F.2d 215 (4th Cir. 1975), *vacated and remanded sub nom. EPA* v. *Brown,* 431 U.S. 99 (1977); *Texas* v. *EPA,*

mulgated by the Administrator, like the federal program under PURPA, mandated the States to provide, through their own agencies and resources, regulatory enforcement over intrastate and interstate commerce of the provisions of the federal program. Each of the courts of appeals noted that the commerce power held by Congress did not include authority to compel the States to administer the details of a federal regulatory scheme.[7] The Fourth Circuit Court of Appeals stated the following:

> [I]t is one thing to strike down a state law under the supremacy clause, or to decide that a state which chooses to engage in activities which Congress has a right to control must do so on Congress' terms, or to hold that Congress may induce a state to act by offering favors or exacting financial penalties if it does not, but it is quite another thing to extract from a state a most fundamental attribute of its sovereignty.

Maryland v. *EPA, supra,* 530 F.2d at 225-26. The Ninth Circuit Court of Appeals emphasized the distinction between the regulation of commerce and the regulation of the "governance" of commerce.

> Neither [*Maryland* v. *Wirtz* nor *Fry* v. *United States]* holds or even suggests that a state's exercise of its police power with respect to an economic activity which affects interstate commerce is itself an economic activity or "species of commercial intercourse" subject to regulation by Congress. *See Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). Nor do we believe that it is proper to equate the operation by a state of a railroad, an *economic activity,* in-

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499 F.2d (5th Cir. 1974); *Brown* v. *EPA,* 521 F.2d 827 (9th Cir. 1975), *vacated and remanded sub nom. EPA* v. *Brown,* 431 U.S. 99 (1977).

[7] *District of Columbia* v. *Train,* 521 F.2d at 990-94; *Maryland* v. *EPA,* 530 F.2d at 225-28; *Texas* v. *EPA,* 499 F.2d at 320 n. 51; *Brown* v. *EPA,* 521 F.2d at 838-40.

distinguishable from that of private parties, with its *governance* of the use of highways and automobiles, an exercise of its police power with respect to commerce.

* * * *

To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt an interpretation of the Clean Air Act which would force us to confront the issue. Such treatment, for example, would authorize Congress to direct the states to regulate any economic activity that affects interstate commerce in any manner Congress sees fit. . . . To make *governance* indistinguishable from *commerce* for the purposes of the Commerce Power cannot be equated to the "unintrusive" regulation of economic activities of the states upheld by the Supreme Court in *Maryland* v. *Wirtz* and *Fry* v. *United States*. A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress.[8]

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[8] *Brown* v. *EPA*, 521 F.2d at 838-39 (footnote omitted) (emphasis original). The principle that Congress may not commandeer the States, their personnel or their resources to enforce a federal regulatory program is one long recognized by the Court. In *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 107 (1861), the Court stated: "And we think it clear that the Federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it. . . ." This principle remains valid today. The suggestion by Appellants herein that the principle has not survived (Appellants' Brief, at 30 n. 34) is in error and represents a misreading of the Court's statement in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978). The precedent which the Court in *Monell* stated had not survived, 426 U.S. at 676, was that precedent which had held that the federal government could not tax the income of employees of the States, and vice versa. *See Ex parte Virginia*, 100 U.S. 339 (1880) and *Graves* v. *New York*, 306 U.S. 466 (1939), cited in *Monell*, 436 U.S. at 676. The Court in

PURPA regulates the States as States by regulating the "governance" of intrastate commerce through usurpation of specific legislative processes of the States.[9] The States' personnel are compelled to perform federal functions whether or not their state-mandated authority, state law, and state funding permit the performance of such functions.[10] Such regulation is beyond the authority of Congress under the Commerce Clause and it thus violates the Tenth Amendment.

The fact that Congress permitted the States discretion with respect to the ultimate decision of whether or not to adopt the rate design and regulatory standards established in Titles I and III of PURPA does not remedy the constitutional invalidity of the Act.[11] This discretion does not extend to the decision of whether or not the State will undertake implementation of the federal program established by PURPA.

The possibility that Congress, *arguendo*, might have been able to preempt the States' regulation of retail utility rates completely also does not remedy the con-

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Monell gave current recognition to the validity of the precedent which held that the federal government *may not* impose duties on States and state officers. *See* 436 U.S. at 678-79.

[9] "[H]ow an Act of Congress may be construed to permit an agency of the United States to direct a state legislature to legislate is difficult to understand." *Maryland* v. *EPA*, *supra*, 530 F.2d at 225.

[10] For example, a State must implement PURPA Section 210 with respect to wholesale transactions in interstate commerce by certain producers of electricity using ratemaking criteria which are inconsistent with the criteria specified for utilities under its jurisdiction. *Compare* PURPA Sections 210(b) and (c) *with, e.g.*, Md. Code. Ann. art. 78, §§1, 68(a) and 69(a).

[11] Pepco notes that a similar discretion is not granted under PURPA Section 210 of Title II.

stitutional invalidity of PURPA.[12] What Congress *might have been able to do* within the limits of its constitutional powers does not alter what it *has* done beyond the limits of its constitutional powers. *Cf. District of Columbia* v. *Train*, 521 F.2d at 992-93; *Maryland* v. *EPA*, 530 F.2d at 225-26.

2. PURPA addresses matters which are "indisputably attributes of State sovereignty"

Congress may not "extract from a state a most fundamental attribute of its sovereignty." *Maryland* v. *EPA*, 530 F.2d at 225-26. The most fundamental attribute of State sovereignty is the right of the State to legislate in the exercise of the State's inherent police powers.

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies. . . .

Duncan v. *McCall*, 139 U.S. 449, 461 (1891). *See Maryland* v. *EPA*, *supra*, 530 F.2d at 225.

The regulation of public utility rates is one example of the State's sovereign exercise of its police powers, recognized since "time immemorial." *Munn* v. *Illinois*, 94 U.S. 113, 125 (1877). The only limitation on this sovereign legislative authority under the police powers is the prohibition against regulation which imposes a direct burden on interstate commerce. *Missouri ex rel. Barrett* v. *Kansas Natural Gas Company*, 265 U.S. 298 (1924); *Pub-*

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[12] Pepco does not agree that such preemption would have been within the constitutional powers of Congress under the Commerce Clause. *See* pages 23-26, *infra*.

lic Utilities Commission v. *Attleboro Steam & Electric Company*, 273 U.S. 83 (1927).

The enactment by Congress of Parts II and III of the Federal Power Act, 16 U.S.C. §§ 824 *et seq.* (1976), and the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1976), did not limit the legislative regulatory authority of the States over public utility retail rates.[13] On the contrary, the Federal Power Act and the Natural Gas Act were intended to, and did, establish federal regulation only over those aspects of the electric and natural gas utility industries which were in interstate commerce, which the Supreme Court had held in *Attleboro* and *Kansas Natural Gas* could not be regulated by the States. *Id.* Therefore, the States fully maintained their legislative authority, prior to PURPA, to regulate all of the retail aspects of the electric and natural gas industries in intrastate commerce.

3. State compliance with PURPA directly impairs the ability of the States "to structure integral operations in areas of traditional functions"

PURPA directly intrudes upon the sovereign legislative authority reserved to the States by the Tenth Amendment to regulate retail utility rates. The regulation of electric and natural gas public utility retail rates in intrastate commerce is a function which has always been performed by the States. Such regulation has occurred pursuant to the sovereign police powers inherent in the States and was pursued by the States well before the federal government entered the field of wholesale for resale electric and natural gas utility regulation in interstate

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[13] *See Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 609-10 (1944); *Connecticut Light and Power Company* v. *Federal Power Commission*, 324 U.S. 515, 522-23 (1945).

commerce. *See Missouri ex rel. Barrett* v. *Kansas Natural Gas Company, supra,* 265 U.S. 298; *Public Utilities Commission* v. *Attleboro Steam & Electric Company, supra,* 273 U.S. 83; *Munn* v. *Illinois, supra,* 94 U.S. 113. According to the Conference Report which accompanied H. R. 4018 (enacted as PURPA), public utility retail rate regulation involves "activities which have traditionally been subject to primary regulation by the States." H. Rep. No. 95-1750, 95th Cong., 2d Sess. 67 (1978).

The traditional regulation by the States of utility retail rates has necessarily required decisions with respect to *when* a particular issue is appropriate for consideration and *by what means* such legislative consideration should be effected. All of these decisions directly involve integral operations of the legislative ratemaking process. PURPA destroys, for it completely usurps, the States' authority to make such decisions with respect to the legislative function of utility retail rate regulation. PURPA mandates the timing, substance, and procedures for state retail ratemaking in connection with each of the federal standards established by PURPA, and attempts to shape the outcome of state regulatory proceedings by prescribing the nature of the inquiry undertaken and the factual determinations to be made in such proceedings. Thus, PURPA directly impairs the ability of the States "to structure integral operations in areas of traditional functions." *Virginia Surface Mining, supra,* 101 S. Ct. at 2366.[14]

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[14] According to PURPA Section 2, 16 U.S.C. § 2601 (1980 Supp.), PURPA was enacted not only under the commerce power of Congress, but also under its powers to preserve the national security. The test of constitutionality, however, should be the same in either case. *See Peel* v. *Florida Department of Transportation,* 600 F.2d 1070, 1084 (5th Cir. 1979). While there may be circumstances where the nature of the national emergency and need for collective action by the federal government warrant intrusion upon the rights reserved to the

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In The Presence Or Absence Of Tenth Amendment Considerations, PURPA Titles I And III And Section 210 Of Title II Violate The Commerce Clause For There Is No Rational Basis Upon Which To Conclude That Retail Ratemaking Requires Uniform National Regulation

The furnishing of public utility services to retail consumers is not interstate commerce, but is "a business of purely local concern exclusively within the jurisdiction of the state." *East Ohio Gas Company* v. *Tax Commission*, 283 U.S. 465, 471 (1931). Congress may not regulate intrastate business unless such regulation can be rationally related to necessary exercise of control over commerce among the States. *Fry* v. *United States, supra*, 421 U.S. at 547. There is no rational basis for federal regulation over retail ratemaking. Retail ratemaking is not commerce, it is the governance of commerce, into which the federal government cannot intrude. *Brown* v. *EPA, supra*, 521 F.2d at 838-39.

The attempt to foster national goals of energy conservation and reduced dependence on foreign oil through retail rates and regulatory practices is not rational. Retail ratemaking does not permit uniform application of standards on a nationwide basis. Retail rate design and regulatory practices must be tailored to meet the unique characteristics of individual utilities and their retail customers. Appropriate rate design and regulatory decisions will vary from utility to utility depending upon factors such as the local climate, density and urbanization of the area, the types of fuels used to power generating plants, the age

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States, for the reasons stated herein with respect to the commerce power of Congress, the circumstances surrounding PURPA could not justify such an intrusion. *See National League of Cities* v. *Usery, supra*, 426 U.S. at 852-53.

and efficiency of generating plants using such fuels, the extent to which various generating plants are required at various times of the day to meet individual customer service requirements, the historic and forecasted rates of growth in customer demand and consumption within the utility's service territory, the nature of utility interconnections, safety and reliability of service, and characteristics and size of customer classes on the system. The impact of these factors upon retail, rather than wholesale, rates is substantial. Federal regulation of retail sales in these circumstances "would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent." *Kidd* v. *Pearson,* 128 U.S. 1, 21 (1888).

It is not a sufficient defense that Congress merely enacted "standards" and not retail rates or regulations themselves. The "standards" are designed to compel the fixing "in stone," by rule, of priorities and preferences which are utterly inconsistent with the States' case-by-case determinations of local utility rates which are just and reasonable based upon the evidence of the case. The "standards" require the States to make antecedent determinations of *national* policy and then to give effect to those determinations in the course of retail ratemaking. It is not rational for fifty States to attempt separately to determine national policy. It also is not rational for those several determinations to be grafted onto the States' regulation of retail utility prices and services to the consuming public with any expectation that national aims will be *better* served than if the "standards" did not exist.

Congress found its aim to be "increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable rates

for electric consumers." PURPA, §2(1), 16 U.S.C. §2601 (1980 Supp.). Accepting this aim, *arguendo*, it is nowhere established that adoption of any of the PURPA "standards" will increase conservation, efficiency or equity. Moreover, nowhere is there any Congressional finding that retail rates as already fixed by the States do not sufficiently foster conservation, efficiency, or equity. Indeed, all three concepts — conservation, efficiency, equity — are undefined, vague terms which, at the local level, have no more specificity or meaning than a characterization of local taxes or local government services as inadequately "conserving," inadequately "efficient," or inadequately "equitable."

In enacting PURPA, Congress itself conceded that "rate structures must reflect the individual needs and local peculiarities of each utility's service area: an appropriate rate design for Hawaii will not be appropriate for Idaho, nor is there any national consensus as to the proper costing methodology to be used to set rates for the various utilities." S. Rep. No. 95-442, 95th Cong., 1st Sess. 9 (1977).

In light of the necessarily localized nature of retail ratemaking decisions explicitly recognized by Congress, a finding that federal regulation of retail rates and regulatory practices is required is unreasonable. Unlike the problem which led to the Economic Stablization Act of 1970 — an Act upheld by the Court in *Fry* v. *United States*, 421 U.S. 542 (1975) — the energy problem which prompted the enactment of PURPA is not a problem which can be reached solely through "collective action by the National Government," *National League of Cities* v. *Usery, supra*, 426 U.S. at 853, by means of uniform application of standards and practices for retail utility ratemaking. Indeed, precisely the opposite is true.

Congress' attempt to regulate retail utility rates and practices has no rational basis. Thus, in the presence or in the absence of Tenth Amendment considerations, Congress has acted in violation of its constitutional powers granted to it by the Commerce Clause.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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